84-1950 (1)

Office - Supreme Court, U.S.
FILED
FEB 21 1985
ALEXANDER L. STEVAS,
CLERK

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

WALTER W. COHEN AND
DON JOSE STOVALL,

PETITIONERS

v.

NANCY BETSON, ANNABELLE WOODARD
AND CYNTHIA WILLIAMS,

RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Eleventh Amendment allows prospective injunctive relief against state officials based on their failure to satisfy the conditions of a federal funding statute passed pursuant to Congress' spending power.

2. Whether the Eleventh Amendment bars a federal court from ordering state officials to conform their conduct to the Court's interpretation of state regulations rather than their own, when those regulations were promulgated to assist in administering a federal funding statute which permits the state officials' interpretation.

TABLE OF PARTIES

The caption of this case in the Court of Appeals for the Third Circuit sets forth the parties to this proceeding in that court as follows:

ROSEANN BARNES, on behalf of herself and all others similarly situated, NANCY BETSON, ANNABELLE WOODARD, and CYNTHIA WILLIAMS

v.

WALTER COHEN, individually and in his capacity as Secretary of the Pennsylvania Department of Public Welfare, DON JOSE STOVALL, individually and in his capacity as Executive Director of the Philadelphia County Board of Assistance; and MARGARET M. HECKLER, individually and in her capacity as Secretary of the United States Department of Health and Human Services

Nancy Betson, Annabelle Woodard, and Cynthia Williams, APPELLANTS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Walter W. Cohen, Secretary of the Department of Public Welfare of the Commonwealth of Pennsylvania, and Don Jose Stovall, Executive Director of the Philadelphia County Assistance Office, hereby petition that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit entered November 23, 1984.

OPINIONS OF THE COURTS BELOW

The opinion of the Court of Appeals for the Third Circuit of which petitioners seek review is reported at 749 F.2d 1009 (3d Cir. 1984). The opinion of the United States District Court for the Eastern District of

Pennsylvania is reported at 578 F.Supp. 154 (E.D. Pa. 1983).

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered November 23, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

1. United States Constitution, Amendment XI:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

2. Social Security Act, Sec. 402(a)(1)-(4), (10)(A), (17), 42 U.S.C. Sec. 602(a)(1)-(4)(10)(A), (17) (1982):

State plans for aid and services to needy families with dependent children; contents; approval by Secretary; records and reports; treatment of earned income advances

(a) Contents

A state plan for aid and services to needy families with children must (1) provide that it shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them; (2) provide for financial participation by the State; (3) either provide for the establishment or designation of a single State agency to administer the plan, or provide for the establishment or designation of a single State agency to supervise the administration of the plan; (4) provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for aid to families with dependent

children is denied or is not acted upon with reasonable promptness;

. . .

(10)(A) provide that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall, subject to paragraphs (25) and (26), be furnished with reasonable promptness to all eligible individuals; and

. . .

(17) provide that if a person specified in paragraph (8)(A)(i) or (ii) receives in any month an amount of income which, together with all other income for that month not excluded under paragraph (8), exceeds the State's standard of need applicable to the family of which he is a member -

(A) such amount of income shall be considered income to such individual in the month received, and the family of which such person is a member shall be ineligible for aid under the plan for the whole number of months that equals (i) the sum of such amount and all other income received in such month, not excluded under paragraph (8); divided by (ii) the standard of need applicable to such family, and

(B) any income remaining (which amount is less than the applicable monthly standard) shall be treated as income received in the first month following the period of ineligibility specified in subparagraph (A).

3. Federal Regulations 45 C.F.R. Sec. 206.10(a)(12) (1982):

Sec. 206.10 Application, determination of eligibility and furnishing of assistance.

(a) . . .

(12) The State agency shall establish and maintain methods by which it shall be kept currently informed about local agencies' adherence to the State plan provisions and to the State agency's procedural requirements for determining eligibility, and it shall take corrective action when necessary.

4. Federal Regulations 45 C.F.R. §233.20(a)(3)(ii)(D) (1982):

Sec. 233.20 Need and amount of assistance.

(a) . . .

(3) . . .

(ii) . . .

(D) Net income, except as provided in paragraph (a)(3)(xiii) of this section, and resources available for current use shall be considered; income and resources are considered available both when actually available and when the applicant or recipient has a legal interest in a liquidated sum and has the legal ability to make such sum available for support and maintenance. When the AFDC assistance unit's income, after applying applicable disregards, exceeds the State

need standard for the family because of receipt of nonrecurring lump sum income, the family will be ineligible for aid for the full number of months derived by dividing the sum of the lump sum income and other income by the monthly need standard for a family of that size. Any income remaining from this calculation is income in the first month following the period of ineligibility....

5. State Regulations, 55 Pa.Code §183.22, 183.44(b)(1)(i):

183.22 AFDC/GA INCOME DEFINITIONS

Income - Cash income-in-kind received by the client, including but not limited to, contributions from legally responsible relative (LRR) and the following:

. . .

(iv) Lump sum payments as provided in §183.44(b) of this title (relating to requirements).

(A) A lump sum payment is a nonrecurring cash payment. Regulations regarding lump sum payments do not apply to any items, as provided in Chapter 257 of this title (relating to reimbursement), for which an acknowledgement of liability is signed, unless the amount required to be reimbursed is less than the lump sum payment. In such cases, the excess remaining would be treated in accord with §183.44(b)(1) of this title (relating to procedures).

. . .

183.44 AFDC INCOME PROCEDURES

(b) The procedure for treatment of AFDC non-earned income is as follows:

(1) Lump Sum Income. The procedures for lump sum income are as follows:

(i) The Types of Lump Sum Income. The types of lump sum income are as follows:

(A) Windfalls. Windfalls may include, but are not limited to prizes, insurance benefits, gifts, inheritances and the like.

(B) Accumulated or Retroactive Benefits. THESE benefits INCLUDE, but are not limited to, retroactive RSDI, Worker's Compensation, or Unemployment Compensation, [w] and the like. Such benefits are usually subject to reimbursement requirements in accordance with Chapter 257 of this title (relating to reimbursement).

STATEMENT OF THE CASE

A. Procedural History

The complaint in this case raised issues regarding federal and state administration of §402(a)(17) of the Social Security Act, 42 U.S.C. §602(a)(17), which describes one requirement for state plans in the Aid to Families with Dependent Children (AFDC) program. The section is known as the "lump sum rule" because it makes a family ineligible for AFDC for a certain number of months after a member of the family assistance unit receives an unusually large amount of income. The number of months is determined by the lump sum (plus other income) divided by the state's standard of need applicable to the family.

The complaint was brought by three Pennsylvania recipients of AFDC on

behalf of themselves and an alleged class[1] against Walter W. Cohen, Secretary of the Pennsylvania Department of Public Welfare (hereafter DPW), Don Jose Stovall, Executive Director of the Philadelphia County Assistance Office and Margaret M. Heckler, Secretary of the United States Department of Health and Human Services (HHS). It claimed that DPW treated personal injury awards for pain and suffering as lump sum income, and that this treatment was illegal for two reasons: (1) it violated provisions of the Social Security Act and federal regulations setting forth requirements for state AFDC plans, and (2) it was inconsistent with Pennsylvania's own published regula-

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[1]The original named plaintiff, Roseann Barnes, was dismissed from the case by agreement of the parties. Betson v. Cohen, 578 F.Supp. 154, 155 (E.D. Pa. 1983).

tions governing AFDC.[2] The complaint requested a declaratory judgment to the effect that personal injury awards could not be lump sum income for AFDC in Pennsylvania, and an injunction enjoining defendants from treating these awards as lump sum income.

After trial the District Court entered judgment for defendants on all of plaintiffs' claims.[3] The Court of Appeals for the Third Circuit reversed solely on the ground that DPW's own regulations, interpreted in light of state common law, did not allow personal

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[2]Plaintiffs also claimed that the lump sum rule could only apply when the recipient had other earned income at the time the lump sum was received. This claim was decided adversely to the plaintiffs by both the District Court and the Court of Appeals, and is not the subject of this petition.

[3]The District Court did not allow the case to proceed as a class action. 578 F.Supp. at 160.

injury awards for pain and suffering to be lump sum income. It rejected petitioners' argument that the Eleventh Amendment prohibited it from granting any relief based upon its interpretation of state regulations. The court ordered only prospective injunctive relief.[4]

B. The AFDC Program and Pennsylvania's Regulations

The AFDC program was created in 1935 and is found at Title IV-A of the Social Security Act, 42 U.S.C. §601 et seq. The law was enacted pursuant to the Spending Clause of the Constitution, U.S. Const. art. I, § 8, 1. Its purpose is to assist the states in providing

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[4]In the Court of Appeals, the case was consolidated for argument with a case on appeal from the District of New Jersey, Harris et al v. Harris, et al. That case raised no issues relating to treatment of personal injury awards.

cash assistance to needy dependent children and the parents or relatives with whom they are living.

States are not required to have AFDC programs. A state that wishes to participate may submit a state plan to HHS. 42 U.S.C. §§601, 602(b). If the plan conforms to Title IV-A and federal regulations, HHS will approve it and the state will be federally reimbursed for approximately half of the assistance provided and administrative costs. 42 U.S.C. §603. The state plan must "provide for granting an opportunity for a fair hearing before the state agency to any individual whose claim... is denied or not acted upon with reasonable promptness. " 42 U.S.C. §602(a)(4). If in administering its plan the state fails substantially to comply with the federal statutory conditions, HHS may, after notice and opportunity for

hearing, terminate or reduce federal payments. 42 U.S.C. §604(a).

Pennsylvania has chosen to participate in the AFDC program. DPW administers AFDC in Pennsylvania. Assistance expenditures are shared at 43.76% state and 56.04% federal. 47 Fed.Reg. 56401 (Dec. 16, 1982). DPW has issued regulations governing the program, which include provisions for fair hearings. 55 Pa.Code §101, et seq.

Section 402(a)(17), the lump sum rule, was added to Title IV-A in 1981.[5] HHS adopted a regulation implementing the rule. 46 Fed. Reg. 46750 (Sept. 21, 1981) (interim); 47 Fed. Reg. 5648 (Feb.

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[5]In 1984 the section was amended in ways that are not relevant to the issues raised by this petition. Deficit Reduction Act of 1984, P.L. 98-369, Sec. 2632, 98 Stat. 494, 1141 (1984).

5, 1982) (final). At the time of the proceedings below, it was codified at 45 C.F.R. §233.20(a)(3)(ii)(D).[6] Also in 1981 Pennsylvania amended its AFDC regulations to provide for the lump sum rule. At the time of the proceedings below, and now, these provisions are found at 55 Pa.Code §183.22 and 183.44 (b)(1). The language relevant to this petition has remained unchanged.

C. The Individual Plaintiffs

In late 1982 and early 1983, two of the plaintiffs, Nancy Betson and Annabelle Woodard, received net proceeds

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[6]HHS has amended the regulation in response to the 1984 statutory amendments. 49 Fed.Reg. 35586 (Sept. 10, 1984). The amendment retains the language relevant to this petition, but relocates it to 45 C.F.R. §233.20(a)(3)(ii)(F).

of personal injury settlements for pain and suffering.[7] Their county assistance offices treated the settlement proceeds as lump sum income and found Ms. Betson and Ms. Woodard ineligible for the number of months resulting from application of the lump sum rule.[8] Both plaintiffs requested and received hearings. DPW's Office of Hearings and Appeals upheld the county assistance offices in both cases. Throughout this litigation, the state officials have taken the position that plaintiffs' personal injury awards were properly treated as lump sum income under the state regulations.

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[7]The remaining plaintiff, Cynthia Williams, received a lump sum retirement benefit and she raised only the issue that the lump sum rule is limited to recipients with earned income.

[8]Neither case was handled by the Philadelphia County Assistance Office.

D. The District Court Decision

The District Court held that federal law permitted the state to treat personal injury awards for pain and suffering as lump sum income. Pet. App. 68a-70a. It then deferred to DPW's interpretation of its own regulations, finding that the interpretation was not "plainly erroneous or inconsistent with the regulation", citing Bowles v. Seminole Rock Co., 325 U.S. 410, 413, 414 (1945). Pet. App. 71a, 72a. At the time of the District Court decision, this Court had not decided Pennhurst State School and Hospital v. Halderman, No. 80-2101 (January 23, 1984).

E. The Court of Appeals' Decision

The Court of Appeals first considered plaintiffs' argument that personal injury awards for pain and suffering could not be lump sum income

under federal law. It found that neither the federal statute nor the federal regulations defined income or lump sum income. It found that the states had been allowed to develop their own definitions of income. Pet App. 31a-35a. The court did not (indeed, could not) find that federal law prohibited a state from considering personal injury awards for pain and suffering as lump sum income. Pet. App. 34a, 35a.

The court then considered plaintiffs' argument that personal injury awards are not lump sum income under Pennsylvania's own regulations. It held that under those regulations, only "windfalls" and "accumulated or retroactive benefits" could be lump sum income, and personal injury awards are neither. According to the Third Circuit, personal injury awards are not windfalls

because under Pennsylvania caselaw those awards are compensatory only. Nor are they accumulated or retroactive benefits because they are not a "fringe benefit" flowing from an employment or governmental relationship as are the examples of accumulated or retroactive benefits given in the state regulation, 55 Pa. Code §183.44(b)(1)(i)(B). The court acknowledged that DPW's interpretation of its own regulations is entitled to deference and was to be accepted unless "plainly erroneous or inconsistent with the regulation". However, the court held that in light of its analysis, DPW's interpretation was plainly inconsistent with its regulations. Pet. App. 35a-42a.

By the time the case was briefed in the Court of Appeals, Pennhurst State School and Hospital v. Halderman, supra had been decided. Petitioners here argued in their brief that the Eleventh

Amendment as applied in Pennhurst precluded any relief based on interpretation of the state regulation. The Court of Appeals rejected this argument. It held that Secretary Cohen's interpretation of the DPW regulations was an action in violation of federal law, and this violation stripped him of state authority under the theory of Ex parte Young, 209 U.S. 123 (1908). The federal laws allegedly violated were provisions (1) that a state AFDC plan "be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them," 42 U.S.C. §602(a)(1); (2) that the state AFDC agency keep informed about local agencies' adherence to the state plan and take corrective action when necessary, 45 C.F.R. §206.10 (a)(12); and (3) that AFDC benefits "be furnished with reasonable promptness to all eligible individuals," 42 U.S.C. §602

(a)(10)(A). The court believed that these provisions imposed a federal requirement that states participating in AFDC comply with their own regulations as interpreted under state law, and that Secretary Cohen had violated this requirement. It concluded that Pennhurst allowed prospective injunctive relief requiring Cohen and DPW to adhere to the court's interpretation of the state regulations. Pet App. 42a-48a.

REASONS FOR GRANTING THE WRIT

In Pennhurst State School and Hospital v. Halderman, No. 81-2101 (January 23, 1984), this Court held that the Eleventh Amendment to the United States Constitution prohibits federal courts from awarding injunctive relief against state officials on the basis of state law. The Court's opinion analyzed the Eleventh Amendment's history and suggested its future application. In the course of its analysis, the Court specifically declined to decide whether Edelman v. Jordan, 415 U.S. 651 (1974), supported the proposition that a federal court may order prospective injunctive relief against states on the basis of federal statutory law. Pennhurst, slip op., at 13, n. 13. Of course, in Edelman, the propriety of ordering prospective injunctive relief against

the state under federal statutory law was conceded by the state. 415 U.S., at 664. This case is the proper vehicle for resolving this important question of constitutional law. In addition this case presents an important question related to the one decided in Pennhurst - whether a federal court may order state officials to comply with the court's interpretation of state regulations which implement a federal aid program when a contrary interpretation would not violate the federal statute.

1. a. The Eleventh Amendment prohibits suit against a state in federal court regardless of the relief sought. Pennhurst, slip op., at 10-11. The only exceptions to the amendment's effect are an express, unequivocal consent to suit by the state, or unequivocal congressional abrogation of the amendment by legis-

lation under Section 5 of the Fourteenth Amendment enforcing rights protected by the Fourteenth Amendment. Pennhurst, slip op., at 8; Hutto v. Finney, 437 U.S. 678, 698, n. 31 (1978); Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).[9]

The Spending Clause statutes such as the Social Security Act do not abrogate the Eleventh Amendment. Edelman v. Jordan, 415 U.S. 651, 674 (1974). The Civil Rights Act of 1871, 42 U.S.C. §1983, likewise does not abrogate the Eleventh Amendment. Edelman v. Jordan, supra, at 675; Quern v. Jordan, 440 U.S. 332, 340-346 (1979).

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[9]The Court has also at times found congressional abrogation of the Eleventh Amendment in legislation under the Commerce Clause, but whether it would do so today is unclear; at least such an abrogation must be quite clear. See Employees v. Missouri Public Health and Welfare Department, 411 U.S. 279 (1973). The Commerce Clause is not the source of authority for the Social Security Act.

A state's participation in a cooperative funding welfare program is not itself a waiver of the Eleventh Amendment. Edelman v. Jordan, supra, at 673. Finally, as the Court recognized in Pennhurst, Pennsylvania by statute, 42 Pa. Cons. Stat. § 8521(b)(1980), expressly preserves its Eleventh Amendment immunity. Pennhurst, slip op., at 12 n. 12.

b. There being no abrogation or waiver of Eleventh Amendment immunity the remaining question is whether the suit is against the state. A suit against state officials is against the state and is barred if the decree would operate against the state - that is, if "'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from

acting, or to compel it to act.'" Dugan v. Rank, 372 U.S. 609 620 (1963) (citations omitted), quoted in Pennhurst, slip op., at 10 n. 11. See also Hutto v. Finney, supra, at 699-700 (suit against state officials is, in essence, against the state). A suit against a state official is not deemed to be against the state (and is not barred) if (1) the official was acting ultra vires of his official authority - with no legal authority whatsoever, Pennhurst, slip op., at 10-11 n.11; or (2) the official was acting ultra vires of his authority under the fiction of Ex parte Young, 209 U.S. 123 (1908) - he was stripped of his official or representative character because he was acting in violation of the supreme authority of federal law. Pennhurst, slip op., at 9-12.

The relief requested here, and granted by the Court of Appeals, prevents

DPW from applying its interpretation of its regulations on the lump sum rule to personal injury awards. The result is that DPW must pay out state money that otherwise it would not have paid. The suit, then, is against the state itself as defined in Pennhurst.

Secretary Cohen (and DPW's employees) were not acting ultra vires of their authority in any real sense. Mr. Cohen was and is the Secretary of Pennsylvania's Department of Public Welfare. By virtue of his office he is statutorily authorized to exercise the powers and perform the duties vested in and imposed upon DPW. Pa. Stat. Ann. tit. 71, § 66 (Purdon Supp. 1984). DPW is an administrative department of the Commonwealth of Pennsylvania. Pa. Stat. Ann. tit. 71, § 61 (Purdon Supp. 1984). It is authorized to establish rules, regulations and standards as to the

nature of public assistance and its extent, and is authorized to develop and submit state plans for assistance programs to the federal government and to take such measures as are necessary to make the Commonwealth eligible for federal funds. Pa. Stat. Ann. tit. 62, §§ 201, 402, 403 (Purdon 1968 & Supp. 1984). Interpretation and application of public assistance regulations is within the scope of Mr. Cohen's official authority and the authority of DPW employees.[10]

c. The Court of Appeals' decision was based on the fiction of Ex parte Young. But as the Court noted in Pennhurst, the fiction of Ex parte Young is quite limited. Pennhurst, slip

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[10]Petitioner Stovall is required to adhere to regulations and standards established by DPW. Pa.Stat.Ann.tit. 62, §§ 417-419 (Purdon 1968).

op., at 12, 23 n. 25.. The Court in Pennhurst specifically reserved the question whether the Ex parte Young fiction would extend to permit prospective relief requiring state officials to spend funds when the basis for the order is a federal statute enacted under Congress's spending power. Pennhurst, slip op., at 13 n. 13. See also King v. Smith, 392 U.S. 309, 312 n. 3 (1968).

Ex parte Young, as interpreted by the Court in Pennhurst, does not strip a state official of his official character when the official's action is alleged to violate a statutory condition of a spending power program. The Court in Pennhurst emphasized at several points that the purpose of the fiction is to allow federal courts to enforce constitutional rights, particularly the Civil War Amendments. Pennhurst, slip op., at 14, 18 n. 17. Ex parte Young itself

emphasized that it was enforcing the Fourteenth Amendment against a threatened violation of it by state officials. 209 U.S. at 145-151, 159, 160.

Title IV-A of the Social Security Act is authorized only by the Spending Clause, not Section 5 of the Fourteenth Amendment, and not the Commerce Clause. It is not authorized by a Civil War constitutional amendment. The statute neither prohibits nor requires any conduct by state officers. The state does not even have to participate in AFDC. The federal law merely offers federal financial assistance to the state if it agrees to abide by the statutory conditions. If the conditions are not met, the funds may be withdrawn by the federal agency. The federal courts have no affirmative mandate to

enforce Title IV-A.[11] Indeed, it creates no private right of action itself. Edelman v. Jordan, supra, at 674.[12]

In Edelman v. Jordan, supra, the Court considered the effect of the Eleventh Amendment in a spending power case. As the Court in Pennhurst observed, it found retroactive relief

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[11]This is not to say that AFDC recipients are without a remedy for violations of the federal statute and implementing regulations. They may utilize the state's fair hearing and appeals procedure. 55 Pa. Code § 275, 42 Pa. Cons. Stat. § 763(a)(1980). Also, they may call any deficiencies to the attention of the Secretary of HHS who can terminate state funding. 42 U.S.C. § 604(a)

[12]Indeed, enforcement of a federal funding statute is effectively the enforcement of a contract between the federal agency and the state. Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981). Actions to compel a state to perform a contract have always been barred by the Eleventh Amendment. Great Northern Life Insurance Co. v. Read, 332 U.S. 47, 51 (1949); Ex Parte Young, supra, at 151-153.

barred in Edelman even though Ex parte Young might have been thought to authorize that relief. Pennhurst, slip op., at 15, 23 n. 25. The state in Edelman did not contest, indeed it conceded, the availability of prospective injunctive relief. 415 U.S. at 664. Thus, this case presents the issue conceded in Edelman and reserved in Pennhurst. This Court should grant review and hold that a state's failure to satisfy conditions of a federal spending power statute does not implicate the fiction of Ex Parte Young.

2. At minimum under Pennhurst, misinterpretation of state law cannot strip an official of state authority and preclude Eleventh Amendment immunity because, in those circumstances, there exists no real federal interest which must be vindicated by suit in federal

court. Pennhurst, slip op., at 10-11 n. 11, 14-15. Here, the Court of Appeals explicitly found that the definition of income was a matter left to the state's discretion. Pet App. 34a.

3. The State's view that personal injury awards are lump sum income violated no federal law. The interpretation of the state regulations that the Court of Appeals imposed was not required by any federal law or regulation.

The provisions of federal law that the Court of Appeals found had been violated were provisions requiring that the state AFDC plan be in effect statewide, and a provision requiring that assistance be furnished with reasonable promptness to all eligible individuals. But the only question decided by the Court of Appeals was the definition of lump sum income - an issue

which, under the federal statute, is solely a question of state law. Thus, the law allegedly violated is ultimately state law. Under Pennhurst, such a violation does not strip a state official of his authority. No strong federal interest is vindicated by overriding the state's own application of discretionary aspects of its own state plan. On the contrary, federal court intrusion violates the principles of cooperative federalism upon which Title IV-A is based.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 84-1043

ROSEANN BARNES, on behalf of herself and all others similarly situated, NANCY BETSON, ANNABELLE WOODARD, and CYNTHIA WILLIAMS

v.

WALTER COHEN, individually and in his capacity as Secretary of the Pennsylvania Department of Public Welfare, DON JOSE STOVALL, individually and in his capacity as Executive Director of the Philadelphia County Board of Assistance; and MARGARET M. HECKLER, individually and in her capacity as Secretary of the United States Department of Health and Human Services

Nancy Betson, Annabelle Woodard, and Cynthia Williams, APPELLANTS

NOS. 84-5063, 84-5064

ESSIE MAE HARRIS and T.E., individually and on behalf of all others similarly situated,

v.

AUDREY HARRIS, individually and in her capacity as Acting Director of the Division of Public Welfare, New Jersey Department of Human Services; GEORGE J. ALBANESE, individually and in his capacity as Commissioner of New Jersey Department of Human Services; and MARGARET M. HECKLER, as Secretary of the United States Department of Health and Human Services,

APPELLANTS

Appeal from the United States District Court
for the District of New Jersey
Civil Action No. 83-4023

ON APPEAL FROM THE UNITED STATES DISTRICT COURTS FOR THE EASTERN DISTRICT OF PENNSYLVANIA AND FOR THE DISTRICT OF NEW JERSEY

Present: SEITZ, BECKER and ROSENN, Circuit Judges

J U D G M E N T

These causes came to be heard on the records from the United States District Courts for the Eastern District of Pennsylvania and for the District of New Jersey and were argued by counsel September 10, 1984.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the United States District Court for the Eastern District of Pennsylvania entered December 30, 1983, appealed here at No. 84-1043, be, and the same is hereby affirmed to the extent that it applies

the "lump-sum rule" to all AFDC families. It is further ordered and adjudged, however, that the portion of the said judgment which holds that the definition of "lump-sum income" includes personal injury awards is hereby reversed. It is further ordered and adjudged that pursuant to eleventh amendment strictures, the said District Court may order only prospective injunctive relief.

It is further ordered and adjudged by this Court that the judgment of the United States District Court for the District of New Jersey entered November 22, 1983, appealed here at Nos. 84-5063 and 84-5064, which applies the "lump sum rule" only to those families with earned income, be, and the same is hereby reversed.

Each side to bear its own costs.

ATTEST:

s/M. Elizabeth Ferguson
Chief Deputy Clerk

November 23, 1984

Certified as a true copy and issued in lieu of a formal mandate on December 17, 1984, as to No. 84-1043 only.

Test: s/M. Elizabeth Ferguson

Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit
Copy

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 84-1043

ROSEANN BARNES, on behalf of herself and all others similarly situated, NANCY BETSON, ANNABELLE WOODARD, and CYNTHIA WILLIAMS

v.

WALTER COHEN, individually and in his capacity as Secretary of the Pennsylvania Department of Public Welfare, DON JOSE STOVALL, individually and in his capacity as Executive Director of the Philadelphia County Board of Assistance; and MARGARET M. HECKLER, individually and in her capacity as Secretary of the United States Department of Health and Human Services
Nancy Betson, Annabelle Woodard, and Cynthia Williams, APPELLANTS

Appeal from the United States District Court for the Eastern District of Pennsylvania
D.C. Docket No. 83-3543

NOS. 84-5063, 84-5064

ESSIE MAE HARRIS and T.E., individually and on behalf of all others similarly situated

v.

AUDREY HARRIS, individually and in her capacity as Acting Director of the Division of Public Welfare, New Jersey Department of Human Services; GEORGE J. ALBANESE, individually and in his capacity as Commissioner of New Jersey Department of Human Services; and MARGARET M. HECKLER, as Secretary of the United States Department of Health and Human Services,
APPELLANTS

Appeal from the United States District Court for the District of New Jersey
Civil Action No. 83-4023

Argued September 10, 1984

Before: SEITZ, BECKER, and ROSENN,
Circuit Judges

(Opinion Filed November 23, 1984)

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OPINION OF THE COURT

ROSENN, Circuit Judge.

In 1981, Congress, as part of the Omnibus Budget Reconciliation Act (OBRA), Pub. L. No. 97-35, revised the Aid to Familes with Dependent Children (AFDC) program by providing that "specified" AFDC beneficiaries who receive lump-sum income in excess of their monthly standard of need are ineligible for program assistance for a specific period of time regardless of whether the lump sum is still actually available. The issue common to the two

cases consolidated for the appeal now before us is whether the "lump-sum" provision applicable to the AFDC program, 42 U.S.C. § 602(a)17, applies to all of its beneficiaries or only those with earned income.

The United States district courts in the two cases at bar came to conflicting conclusions. In Betson v. Cohen, 578 F.Supp. 154 (E.D. Pa. 1983), the United States District Court for the Eastern District of Pennsylvania denied injunctive relief after holding that the provision applied to all AFDC families. On the other hand, the United States District Court for the District of New Jersey in Harris v. Heckler, 576 F.Supp. 915 (D.N.J. 1983), granted summary judgment for the plaintiffs upon holding that the provision applied only to beneficiaries with earned income. The Pennsylvania cases presented the

additional question of whether personal injury damage awards or settlements are included in the definition of "lump-sum income" under the applicable state and federal law. The district court answered this question in the affirmative.

The Pennsylvania plaintiffs and the New Jersey defendants have appealed. We reverse in the New Jersey case. In the Pennsylvania case, we affirm on the application of the lump-sum provision, but reverse on the question of whether personal injury awards constitute income.

I. Background

The AFDC program, established by Congress under Title IV-A of the Social Security Act, is a federal-state matching-fund activity that provides financial assistance to needy dependent children and their parents who live with

and care for them. The program is operated at the federal level by the Department of Health and Human Services (HHS). In Pennsylvania, it is administered by the Pennsylvania Department of Public Welfare (PDPW) and in New Jersey through the Division of Public Welfare (NJDPW) of the Department of Human Services (DHS). Defendant Walter Cohen is Secretary of the PDPW; defendant Audrey Harris is Director of the NJDPW. Federal defendant Margaret Heckler is Secretary of HHS.

Eligibility for AFDC benefits depends on the financial circumstances of the applicant or recipient. That is, they must have income and resources below applicable limits in order to be eligible for AFDC benefits. In making this determination, the focus is on income and resources that are actually available. See, e.g., Shea v. Vialpando,

416 U.S. 251, 261-62 (1974); 45 C.F.R. § 233.20(a)(3)(ii)(D). When Congress changed the law in 1981, it altered this scheme somewhat by providing that "specified" AFDC beneficiaries who receive lump-sum income in excess of their monthly standard of need are ineligible for a specific period of time regardless of whether the lump sum is still actually available. The period of disqualification is determined by dividing the state standard of need for assistance to such a family into the amount of the lump sum; the quotient is the number of months of disqualification. See 42 U.S.C. § 602(a)(17).

The plaintiffs are contesting the federal and state regulations passed to implement this section. They contend that, under 42 U.S.C. § 602(a)(17), the "specified" AFDC beneficiaries to whom the lump-sum rule applies are those with earned income. HHS, PDPW, and NJDPW,

however, insist that the lump-sum rule applies to all beneficiaries regardless of whether they have earned income. See 45 C.F.R. § 233.20(a)(3)(ii)(D); 55 Pa. Code § 183.44(b)(1)(iii),(iv); N.J.A.C. 10:82-4.15(a).

The instant cases arose after the plaintiffs, AFDC beneficiaries without earned income, received lump sums of money from various sources. In the New Jersey case, plaintiff Essie Mae Harris received $11,568.36 in life insurance proceeds and plaintiff Theresa Eisen received a bequest of $5,329. As for the Pennsylvania plaintiffs, Nancy Betson and Annabelle Woodward received lump sums in settlement of personal injury claims and Cynthia Williams received retirement benefits.[1] In all five cases, the

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[1] Roseann Barnes is no longer a party to this case. For a discussion of the disposition of her complaint, see Betson v. Cohen, 578 F.Supp. 154, 155 (E.D. Pa. 1983).

plaintiffs believed that the lump-sum provision did not apply to them, and the sums were dissipated in a relatively short time.[2] The state agencies, however, applied the lump-sum provision to the plaintiffs and terminated their benefits for periods extending long past the date the funds were exhausted. This therefore left them destitute. The New Jersey district court subsequently granted relief to the plaintiffs there upon finding that the lump-sum disqualification applied only to those with earned income. The Pennsylvania district court denied similar relief.

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[2]In thinking that the provision did not apply to them, the plaintiffs apparently thought that they would be ineligible for assistance only during the time that the lump sum lasted. That is, they believed that they would be eligible again once the funds were exhausted.

The Pennsylvania plaintiffs, in addition to arguing that 42 U.S.C. § 602(a)(17) should apply only to those families with earned income, also contend that compensation for personal injuries is not "income" as that term is used in the federal statute and state regulations. This conflicts with the PDPW's determination that personal injury awards are properly included as a type of lump-sum "income." The Pennsylvania court held that neither the Social Security Act nor the state's own regulations were violated by the PDPW's application of the rule to personal injury awards. Betson, 578 F.Supp. at 159-60.

II. Applicability of § 602(a)(17) to Families Without Earned Income

The standard of review of the district courts' decisions is whether they applied the correct legal precepts

in reaching their legal conclusions. This court may exercise an independent review of the question of law presented. See Shands v. Tull, 602 F.2d 1156 (3d Cir. 1979).

In interpreting a statute, the starting point is of course the language of the statute itself. See American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982); Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). It is to be presumed that "the legislative purpose is expressed by the ordinary meaning of the words used," Richards v. United States, 369 U.S. 1, 9 (1962), and if the statutory language is clear, it is not necessary to examine the legislative history, see TVA v. Hill, 437 U.S. 153, 184 n. 29 (1978).

When 42 U.S.C. § 602(a)(17) is read objectively, and with no knowledge

of the legislative history, it seems to be unambiguous. By its terms, the lump-sum disqualification applies only to "a person specified in paragraph 8(a)(i) or (ii)." These sections, in turn, specifically refer only to individuals who have earned income. Furthermore, the very use of the term "specified" suggests limitation. See Harris v. Heckler, 576 F.Supp. at 918 ("[i]n common parlance, the word 'specify' contains some connotation of restriction") (quoting Clark v. Harder, 577 F.Supp. 1085, 1087 (D.Kan. 1983)). Because the statute, by its very existence, has already restricted the statutory focus to AFDC applicants and recipients, section 602(a)(17)'s reference to persons "specified" in paragraph (8)(A)(i) or (ii) suggests a more restrictive meaning. Id.

Further support for this position is supplied by the ability of Congress clearly to provide for "universal" application of numerous other rules when it so intended. For example, section 602(a)(13), requiring determinations of eligibility on a monthly basis, section 602(a)(16), providing for the reporting of child abuse and neglect, and section 602(a)(21), dealing with loss of benefits to strikers, contain no limiting language and therefore apply to all beneficiaries. Congress could have followed this pattern and made the lump-sum rule applicable to all AFDC families simply by omitting the phrase "specified in paragraph 8(A)(i) or (ii)."

Even if it is assumed that, for some reason, Congress desired to cite to some provision, "paragraph (8)(A)(i) or (ii)" was inappropriate if universal

coverage was desired. As the court in Harris pointed out, "If Congress intended the lump sum rule to apply to all applicants, it is difficult to understand the reference to paragraphs (8)(A)(i) and (ii), the only sections of the statute that discuss earned income." 576 F.Supp. at 918. It would have been much better to cite to the preceding paragraph (7) which provides general guidelines for determining the need of all applicants. Thus, if Congress chose to refer back, it readily could have adopted the same formation it did in § 602(a)(31), and incorporated paragraph (7) to include all applicants. Id. at 919.

Despite the initial appearance of statutory unambiguity, the courts that have construed 42 U.S.C. § 602(a)(17) have come to conflicting

conclusions.[3] The courts that have found the statute to be ambiguous have typically relied on the argument that, while it is true that "specified" generally connotes limitation, paragraphs (8)(A)(i) and (ii) do not specify "persons" as much as they specify types and amounts of income. See Faught v.

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[3]Compare Faught v. Heckler, No. 83-2609 (8th Cir. June 15, 1984) (finding ambiguity); Sweeney v. Murray, 732 F.2d 1022 (1st Cir. 1984) (same); Reed v. Lukhard, No. 83-0493, slip op. (W.D. Va. July 26, 1984) (same); Betson v. Cohen, 578 F.Supp. 154 (E.D. Pa. 1983) (same); Clark v. Harder, 577 F.Supp. 1085, 1087 (D.Kan. 1983) (same); and Douthit v. Heckler, 577 F.Supp. 88 (D.Neb. 1983) (same), with Harris v. Heckler, 576 F.Supp. 915, 919 (D.N.J. 1983) (finding that statute unambiguously applies to only those recipients with earned income); Sweeney v. Affleck, 560 F.Supp. 1118, 1123-24 (D.R.I. 1983) (same), rev'd sub nom. Sweeney v. Murray, 732 F.2d 1022 (1st Cir. 1984); and Vermeulen v. Kheder, No. 82-135, slip op. at 24 (W.D. Mich. June 3, 1982) (same). The Sixth Circuit, meanwhile, found that the statute clearly applies to all beneficiaries. See Walker v. Adams, No. 83-5527 (6th Cir. Aug. 20, 1984).

Heckler, No. 83-2609, at 5 (8th Cir. June 15, 1984); Clark v. Harder, 577 F.Supp. at 1087; cf. Sweeney v. Murray, 732 F.2d at 1026-27. The most extensive statement of this proposition is in Clark v. Harder:

> It appears to this court that the all-important paragraphs (8)(A)(i) and (ii) do not specify "persons" as much as they specify types and amounts of earned income which are not considered for the purpose of determining need for all persons applying for AFDC. Since all persons applying for assistance have their need determined in accordance with paragraph (8)(A)(i) and (ii), it is possible that all applicants are the persons "specified" for coverage by the lump sum rule.

577 F.Supp. at 1087.

This may be a plausible argument and, as the split in authority suggests, reasonable persons can disagree as to the proper interpretation of section 602(a)(17). Consequently, we find ourselves in the same position as the district court in Faught v. Heckler

which stated, "Having read [the various opinions on the matter], the Court cannot say that the statute is as unambiguous as it appeared to the Court initially." 577 F.Supp. at 1185. Thus, given the now apparent ambiguity, we turn to the legislative history of the statute.

The legislative history of 42 U.S.C. § 602(a)(17) is itself not free from ambiguity, but an objective reading of the available history would appear to support the defendants' position--i.e., that the lump-sum rule was meant to apply to all beneficiaries. It is not really disputed that Congress had two major purposes in amending subjection [sic] (a)(17): to promote responsible budgeting of lump-sum income by AFDC families, and to reduce the governmental cost of the AFDC program. See Sweeney v. Murray, 732 F.2d at 1027. With

respect to the "responsible budgeting" argument, Congress noted that the old system had "the perverse effect of encouraging the family to spend [lump-sum] income as quickly as possible in order to retain AFDC eligibility." S.Rep. No. 139, 97th Cong., 1st Sess. 505, reprinted in U.S. Code Cong. & Ad. News 396, 771 (Report of the Committee on the Budget). According to an affidavit filed by JoAnne Ross, the federal Associate Commissioner for Family Assistance, only seven per cent of the AFDC caseload had earned income. See Sweeney, 732 F.2d at 1027. Thus, if (as the plaintiffs argue) the statute applies only to those with earned income, the "perverse effect" noted by the Senate would continue for 93 per cent of AFDC families. If such an anomalous result were intended, one would expect that it would be supported

by explicit language in the statute or its legislative history. No such support is to be found.

The "budget cutting" argument also supports the defendants' position. The Senate Report estimated that the new lump-sum rule would save $5 million per year. See S.Rep. No. 139, 97th Cong. 1st Sess. 505, reprinted in 1981 U.S. Code Cong. & Ad. News 396, 771. This estimate was based on AFDC caseload figures provided to Congress by HHS, which had assumed that the amended lump-sum rule would apply to the entire AFDC caseload, and not merely the estimated 7% of families with earned income. Application of the lump-sum rule to only these families would have reduced the estimated savings to about $350,000--a small fraction of the $5 million estimate found in the Senate Report. Thus, assuming that the Senate

Report is to be given some weight, cf. Dickenson v. Petit, 692 F.2d 177, 181 (1st Cir. 1982) (determining legislative intent by examining HHS cost-saving estimates), the minimal reduction in AFDC costs that would result if only "earned income" families were included supports the defendants' position.

Perhaps the most persuasive argument to the contrary is that Congress apparently desired to reduce the number of recipients with earned income, and to confine AFDC to those without other sources of income. See Harris, 576 F.Supp. at 920. Congressman Latta, who sponsored the amendment containing the lump-sum provision, stated that "[w]e can restore welfare under an income-support program for those with no other means of support rather than the massive income supplementation program it has become." 127

Cong. Rec. H3809 (daily ed. June 26, 1981) (emphasis added). Thus, it would be possible to argue that Congress consciously restricted certain benefits to those with no other "resources" (such as earned income) to fall back on. This, however, would create incentives for AFDC beneficiaries not to work. If Congress truly intended this result, one would expect an explicit statement to that effect. But cf. Sweeney, 732 F.2d at 1029 n.11; Harris, 576 F.Supp. at 921-22.

A recent amendment to 42 U.S.C. § 602(a)(17) provides further support for the defendants' position. On July 23, 1984, Congress enacted an amendment to the lump-sum provision as part of the Deficit Reduction Act of 1984. H.R. 4170, 98th Cong., 2d Sess. 130 Cong. Rec. H6554 (1984). This amendment omits the reference to "a person specified in

paragraph (8)(A)(i) or (ii)" and substitutes a full description of all AFDC beneficiaries and "essential persons": "a child or relative applying for or receiving aid to families with dependent children, or any other person whose needs the State considers when determining the income of a family."

Although it is well established that subsequent legislation reflecting Congress' "interpretation" of an earlier act is entitled to substantial weight in determining the meaning of an earlier statute, see Bell v. New Jersey, 41 U.S.L.W. 4647, 4650 (U.S. May 31, 1983): Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380-81 (1969), the question here is whether the amendment in question is to be considered a "clarification" or a "change." Both the case law (though this is of limited help) and postenactment statements made

by two congressmen, including the chairman of the Conference Committee that considered the amendment, support the former construction. Numerous cases suggest that where, as here, there is an amibguous statute or a "dispute or ambiguity, such as a split in the circuits, [this is] an indication that a subsequent amendment is intended to clarify, rather than change, the existing law." Brown v. Marquette Savings & Loan Association, 686 F.2d 608, 615 (7th Cir. 1982) (citing 2A Sutherland Statutory Construction § 49.11 at 265-66 (4th ed. 1973)); cf. Anderson Bros. Ford v. Valencia, 452 U.S. 205 (1981). This issue cannot be taken as settled, however, for "[a] number of cases . . . have taken the contrary position, and hold that where an act is amended . . . so that doubtful meaning is resolved such action consti-

tutes evidence that the previous statute meant the exact contrary." 2A Sutherland Statutory Construction, supra, § 49.11, at 265.

Thus, statements made by Senator Dole and by Representative Rostenkowski, chairman of the Conference Committee, shortly after the passage of the Deficit Reduction Act take on added significance. They explicitly stated that the purpose of the amendment to the lump-sum provision was to clarify the original statute in light of conflicting court decisions. See 130 Cong. Rec. S10644 (daily ed. Aug. 10, 1984) (remarks of Sen. Dole); id. at E3590 (remarks of Rep. Rostenkowski). Although statements as to legislative intent made by legislators subsequent to the enactment of a statute are typically not entitled to great weight, see United States v. United Mine Workers, 330 U.S. 258,

281-82 (1947), such statements are nevertheless "entitled to consideration as an expert opinion concerning [the statute's] proper interpretation." 2A Sutherland Statutory Construction, supra, § 49.11 at 266; see also North Haven Board of Education v. Bell, 456 U.S. 512, 535 (1982) (postenactment developments constitute "authoritative expressions concerning the scope and purpose of [the original statute]") (quoting Cannon v. University of Chicago, 441 U.S. 667, 687 n.7 (1979)). Such consideration would appear to tip the scales in favor of finding the amendment to be a "clarification" rather than a "change."

Finally, some weight must be given to the administrative interpretation of the statute. See Udall v. Tallman, 380 U.S. 1, 16 (1965) (the interpretation of a statute by the

agency charged with its administration is entitled to deference). The HHS regulation applies the lump-sum rule to the "AFDC assistance unit's income, after applying applicable disregards." 45 C.F.R. § 233.20(a)(3)(ii)(D). Thus, the regulation clearly includes all AFDC beneficiaries within its scope. This administrative interpretation is, of course, not conclusive. See Zuber v. Allen, 396 U.S. 168, 192 (1969); Cleary v. United States Lines, 728 F.2d 607, 610 n.6 (3d Cir. 1984). Nevertheless, it provides solid additional support for the defendants' position.

In sum, we hold that 42 U.S.C. § 602(a)(17) applies to all AFDC families, rather than only to those with earned income. The only other circuits that have addressed this issue have come to the same conclusion. See Walker v. Adams, No. 83-5527 (6th Cir. Aug. 20,

1984); Faught v. Heckler, No. 83-2609 (8th Cir. June 15, 1984); Sweeney v. Murray, 732 F.2d 1022 (1st Cir. 1984).

III. Personal Injury Awards as "Lump-sum Income" Under Applicable State and Federal Law

The Social Security Act specifically applies the lump-sum disqualification rule only to recipients of lump-sum "income." See 42 U.S.C. § 602(a)(17). Similarly, the federal regulations apply the rule only to recipients of "nonrecurring lump-sum income." 45 C.F.R. § 233.20(a)(3)(ii)(D) (emphasis added). Still, neither the statute nor the regulations define the term "income." See Betson v. Cohen, 578 F.Supp. 154, 159 (E.D. Pa. 1983). The statute does, however, distinguish between "income" and "resources." See 42 U.S.C. § 602(a)(7)(A) (providing that the state agency "shall, in determining

need, take into consideration any other income and resources of any child or relative claiming aid") (emphasis added). For example, while all "income" must be counted against the monthly AFDC grant unless it is specifically excluded, see id., unexcluded "resources" render an AFDC family ineligible only if the equity value of the resources exceeds $1,000, see 42 U.S.C. § 602(a)(17)(B).

Two of the plaintiffs in Betson v. Cohen received lump sums in settlement of personal injury claims. Their contention here is that, while the lump sums are arguably "resources," they are not "income" and therefore do not trigger the "lump-sum income" rule. Regrettably, the federal law on the subject lends very little help. As we have just noted, neither the statute nor the regulations define "income" and, thus, there is no indication of whether

personal injury awards are included within the meaning of that term. Furthermore, only three reported cases present any relevant discussion of the issue,[4] and even among these cases there is no consensus of opinion. Compare Jackson v. Guissinger, No. 83-2695 (W.D. La. June 12, 1984) (finding that personal injury awards are properly included within the definition of "income"), and Betson v. Cohen, 578 F.Supp. 154, 159 (E.D. Pa. 1983) (same), with Reed v. Lukhard, No. 83-0493 (W.D. Va. July 26, 1984) (personal injury awards found not to be "income"). Unlike the federal law, the

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[4]Several cases, however, assume without discussion that personal injury awards are to be included within the notion of "income." See Sweeney v. Murray, 732 F.2d at 1024 (referring to "lump-sum income . . . such as . . . a personal injury judgment or settlement"); see also Walker v. Adams, No. 83-5527, slip op. at 5 (6th Cir. 1984).

Pennsylvania state regulations do define "income." See 55 Pa. Code §§ 183.22, 183.44(b)(1)(i). Because we find the state law to be dispositive, it is not necessary for us to reach the issue of the proper interpretation of the federal statute.

With respect to state law, we begin by noting that if there were an applicable federal regulation or statutory provision, the states would of course be bound to follow it. See Nolan v. deBaca, 603 F.2d 810 (10th Cir. 1979), cert. denied, 446 U.S. 956 (1980); Holley v. Lavine, 553 F.2d 845 (2d Cir. 1977), cert. denied, 435 U.S. 947 (1978). As already noted, however, neither Congress, in the statute, nor HHS, in its regulations, has provided any definition of the word "income." Thus, consistent with the great deal of discretion given to states participating

in the AFDC program, see Dandridge v. Williams, 397 U.S. 471, 478 (1970); King v. Smith, 392 U.S. 309, 318 (1968), the states have been allowed to develop their own definitions of income. Cf. 46 Fed. Reg. 46,755 (1981) (HHS interim rules implementing a lump-sum provision suggesting that definition of income was a matter of state discretion which was unchanged by OBRA: "For purposes of this provision, the new regulations do not alter the definition of income now employed by States."). In Pennsylvania, the applicable regulations include within the definition of "income":

> (iv) Lump sum payments as provided in § 183.44(b) (relating to procedures).

55 Pa. Code § 183.22. At § 183.44(b)(1)(i), there is the following description of lump-sum income:

> The types of lump sum income are as follows:

(A) Windfalls. Windfalls may include, but are not limited to prizes, insurance benefits, gifts, inheritances and the like.

(B) Accumulated or retroactive benefits. These benefits include, but are not limited to, retroactive RSDI, Worker's Compensation, or Unemployment Compensation, and the like. Such benefits are usually subject to reimbursement requirements in accordance with Chapter 257 (relating to reimbursement).

The use of the phrase "The types of lump sum income," 55 Pa. Code § 183.44(b)(1)(i) (emphasis added), indicates that "windfalls" and "accumulated or retroactive benefits" are not merely examples, but instead are the only types of payments subject to the lump-sum rule. With respect to windfalls, it is clear that under Pennsylvania law a personal injury award does not constitute a windfall. "Clearly, damages are to be compensatory to the full extent of the injury sustained, but the award should be

limited to compensation and compensation alone." Incollingo v. Ewing, 444 Pa. 263, 299, 282 A.2d 206, 228 (1971); accord Hahn v. Atlantic Richfield Co., 625 F.2d 1095, 1104 (3d Cir. 1980) ("If injury occurs, tort law attempts to place the injured party in the same position he occupied before the injury.") (emphasis added), cert. denied, 450 U.S. 981 (1981). In fact, the district court essentially acknowledged that personal injury awards are not typically considered windfalls. Betson, 578 F.Supp. at 160. Thus, any reliance on a windfall classification is unjustified.[5]

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[5]Whether the damages are paid by the tort-feasor or his insuror should, of course, not be relevant. Therefore, the inclusion of "insurance benefits" in the statute as an example of a windfall should not be seen as referring to insurance payments in settlement of personal injury damage claims, but

FOOTNOTE CONTINUED ON NEXT PAGE

To classify personal injury awards as accumulated or retroactive benefits would also seem to be improper. Both the accepted meaning of the word "benefit" and the examples presented in the statute suggest that § 183.44(b)(1)(i)(B) is referring to assistance accruing as the result of employment, or a government entitlement program. In essence, the benefits in question can be viewed as accumulated, unpaid wages that have, on the occurrence of some event (e.g., retirement, sickness, unemployment), become payable. There is no attempt to make the individual whole.

FOOTNOTE CONTINUED

rather to insurance benefits, such as life insurance proceeds, which are properly considered windfalls. This is supported by PDPW's policy not to treat insurance payments compensating for the loss of, or damage to, exempt resources as windfalls. Cf. PDPW Opinion and Order, Feb. 21, 1984 (187a).

Instead, there is merely the payment of some set amount that the individual expected to have paid to him, as the result of his employment status, upon the occurrence of some specified event. A personal injury damage award, on the other hand, is of course in no way a "fringe benefit" flowing from an employment or governmental relationship. The award is instead intended only to restore the plaintiff to the position he was in before the injury.

The district court in Betson v. Cohen, apparently realizing that damage awards are not ordinarily considered "accumulated or retroactive benefits" or "windfalls", relied primarily on the last sentence of § 183.44(b)(1)(i)(B) which states: "Such benefits are usually subject to reimbursement requirements in accordance with Chapter 257 . . . ." That is, the district

court concluded that personal injury awards were subject to the lump-sum rule under the state's regulations, "in light of the cross-reference to section 257 which includes 'personal damage claims and awards' in its list for reimbursement to the agency." Betson, 578 F.Supp. at 160. This approach of viewing the reimbursement requirements and the definition of lump-sum income as essentially coextensive was improper. First, the regulation itself merely states that the benefits in question "are usually subject to reimbursement requirements." 55 Pa. Code § 183.44(b)(1)(i)(B) (emphasis added). Thus, perfect congruity is not even implied. Second, the lack of identity is supported by several examples. For instance, some payments subject to the lump-sum rule, such as retroactive Social Security benefits, are not subject to reimburse-

ment. See Philpott v. Essex County Welfare Board, 409 U.S. 413 (1973) (Social Security Act prohibits state enforcement of reimbursement from retroactive Social Security disability benefits). Conversely, other payments, such as receipts from the sale of an exempt resource, may be regarded as subject to reimbursement, but are not windfalls or income. See PDPW Opinion and Order Feb. 21, 1984.

The PDPW interpretation of its own regulations is, of course, entitled to considerable deference. As Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413-14 (1945), suggests, however, we need not accept the agency interpretation if it is "plainly erroneous or inconsistent with the regulation." Id. at 414. The PDPW has interpreted the regulation as including personal injury awards within the definition of lump-sum

income. Based on the analysis presented above, we conclude that the PDPW interpretation is actually "inconsistent with the regulation." Thus, we do not accept that interpretation, and instead hold that the lump-sum income rule does not apply to personal injury awards under the Pennsylvania regulations.

The defendants argue that such a holding violates the eleventh amendment inasmuch as a federal court is instructing state officials on how to conform their conduct to state law. See Pennhurst State School & Hospital v. Halderman, 52 U.S.L.W. 4155, 4159 (U.S. Jan. 23, 1984). Because, as we shall point out infra, the state officials' conduct violated federal law, as well as state law, we find this contention to be without merit.

In Pennhurst, the Supreme Court held that the eleventh amendment bars

federal injunctive relief against a state official if (1) "'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' or if the effect of the judgment would be to 'restrain the Government from acting, or to compel it to act.'" 52 U.S.L.W. at 4158 n.11 (quoting Dugan v. Rank, 372 U.S. 609, 620 (1963)), and if (2) the conduct to be restrained is within the scope of authority delegated to the official by state law, see id. at 4158. A state official, however, will be stripped of his authority if he acts in violation of the United States Constitution or federal statutory law. See Ex parte Young, 209 U.S. 123 (1980); see also Pennhurst, 42 U.S.L.W. at 4158 ("Thus, in Edelman v. Jordan, 415 U.S. 651 (1974), the Court emphasized that the Eleventh Amendment bars some forms

of injunctive relief against state officials for violation of federal law.") (emphasis added); Halderman v. Pennhurst State School & Hospital, 673 F.2d 647, 656 (3d Cir. 1982) ("Thus it is quite plain that the Eleventh Amendment is no bar to the prospective injunctive relief which was ordered by the district court insofar as that relief is predicated on constitutional or federal statutory claims."), rev'd on other grounds, 52 U.S.L.W. 4155 (U.S. Jan. 23, 1984). Thus, as the defendants acknowledge, the Pennhurst decision does not preclude claims for injunctive relief against state officials based on violations of federal law.

The AFDC statute explicitly requires state AFDC plans to "be in effect in all political sudivisions [sic] of the State, and, if administered by them, be mandatory upon them." 42

U.S.C. § 602(a)(1). We read this federal law as requiring the state to adhere to its own regulations, at least so long as the regulations are still in effect. In the instant case, PDPW officials were treating personal injury awards as income subject to the lump-sum rule. As noted earlier, such action is inconsistent with the state regulation. The Pennsylvania officials, then, were not adhering to their own regulations and, consequently, violated the state AFDC plan, thereby transgressing federal law.[6] Thus, the Pennhurst case is

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[6]The state officials' violation of the state regulation actually violated federal law in a number of respects. First, as noted in the text, there is a violation of section 602(a)(1). Although this violation in all probability also amounts to a breach of the contract with the federal government (thus entitling the Secretary to proceed under 42 U.S.C. § 604), it nevertheless remains a violation of federal law by virtue of the state's deviation from the mandatory

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provisions of section 602(a). That is, we read 42 U.S.C. § 602(a)(1) as not only requiring that a provision be inserted within the state plan to the effect that it must be adhered to in all political subdivisions, but also that if the plan is administered by the state, the state must in fact adhere to it.

The violation of the state regulation amounts to a federal violation in another respect--i.e., there is a failure to comply with 45 C.F.R. § 206.101(a)(12). This provision requires that the state agency ensure adherence to the state plan. Corrective action is to be taken by the agency when necessary, in the instant case, the state plan has not been adhered to an no corrective measures were taken. Thus, once again, there is a violation of federal law--i.e., a failure to comply with this regulation.

Finally, 42 U.S.C. § 602(a)(10) requires that aid be furnished with reasonable promptness to all eligible individuals. Just as states may not deny benefits to individuals who meet federal requirements, so too the Social Security Act prohibits a state from refusing assistance to individuals who are eligible under state law. See 45 C.F.R. § 206.101(a)(12); 45 C.F.R. § 205.120(a)(1); Coleman v. O'Bannon, 550 F.Supp. 195 (E.D. Pa.), aff'd, 692 F.2d 748 (3d Cir. 1982), cert. denied, 103 S.Ct. 1449 (1983). As discussed above, Pennsylvania law does not apply the

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inapplicable[7] and injunctive relief against the state officials is not

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lump-sum rule to personal injury damage awards. The state officials, however, applied the rule in an erroneous manner and thereby deprived individuals who were eligible for assistance (under a correct interpretation of the regulation) of their benefits. Thus, the PDPW's application of the lump-sum rule to plaintiffs Betson and Woodward violated the Social Security Act requirement that aid be furnished to all eligible individuals.

[7]It is true that, under Pennhurst, a mere mistake in the application of state law, where that misapplication is a violation of only state law, does not strip a state official of his authority and make him individually liable in federal court. 52 U.S.L.W. at 4183 n.11, 4161, 4162. In the case at bar, however, the "mere misapplication" violates not only state law but also federal law (i.e., 42 U.S.C. § 602(a)(1)).

precluded.[8] It must be noted, however, that only prospective injunctive relief is possible. Anything more, such as a retroactive monetary award, would run afoul of the eleventh amendment. See Edelman v. Jordan, 415 U.S. 651, 665-69 (1974) (holding that when a plaintiff sues a state official alleging a violation of federal law, a federal court may award an injunction that governs the officials' future conduct, but not one that awards retroactive monetary relief); see also Pennhurst, 52 U.S.L.W. at 4158.

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[8]The propriety of federal court involvement in cases such as this is further supported by the intensely federal nature of the AFDC program. See, e.g., King v. Smith, 392 U.S. 309, 316 (1978) (AFDC program "financed largely by the Federal Government"); cf. Federal Land Bank v. Board of County Comm'rs, 582 F.Supp. 1507, 1512 (D.Colo. 1984) (court held, in non-AFDC case, that Pennhurst was inapplicable since "questions presented [were] more federal in nature than those raised in Pennhurst").

IV. Conclusion

In summary, the judgment of the New Jersey District Court in Harris v. Heckler, applying the lump-sum rule only to those families with earned income, will be reversed. The judgment of the Pennsylvania district court in Betson v. Cohen will be affirmed to the extent that it applies the rule to all AFDC families. That portion of Betson holding that the state definition of "lump-sum income" includes personal injury awards, however, will be reversed. Pursuant to eleventh amendment strictures, only prospective injunctive relief will be mandated.

Each side to bear their own costs.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

ENTERED: 12-30-83

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NANCY BETSON, ANNABELLE WOODARD and CYNTHIA WILLIAMS on behalf of themselves and all other	:	FILED DEC. 29, 1983
similarly situated	:	C.A. NO. 83-3543
VS.	:	
WALTER COHEN, Secretary of the Pennsylvania Department of Public Welfare; and DON JOSE STOVALL, Executive Director of the Philadelphia County Board of Assistance; and MARGARET M. HECKLER,; Secretary of the United States Department of Health and Human Services	:	

MEMORANDUM OPINION AND ORDER

WEINER, J. DECEMBER 29, 1983

This action was initially brought in July 1983 by Roseann Barnes on behalf of herself and a putative class challenging federal regulations

and state implementation of a section added to the Social Security Act in 1981 regarding the lump sum income received by Aid to Families with Dependent Children (AFDC) assistance units. Her complaint was dismissed with prejudice as to her and without prejudice as to the putative class, by agreement of the parties. Thereafter, Nancy Betson, Annabelle Woodard, Cynthia Williams and a woman filing anonymously as Juana del Pueblo filed a motion to intervene and reinstate the complaint together with an intervenor's complaint, a second amended complaint and a motion for a temporary restraining order and/or preliminary injunction.[9] They have also filed a

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[9]In accordance with Rule 65(a)(2) of the Federal Rules of Civil Procedure, and by agreement of the parties, the court has consolidated the trial of the action on the merits with the hearing on the application of a preliminary injunction. That hearing was held on December 14, 1983.

motion for class certification.

State defendants Walter Cohen, Secretary of the Pennsylvania Department of Public Welfare ("DPW") and Don Jose Stovall, Executive Director of the Philadelphia County Board of Assistance together with federal defendant Margaret M. Heckler, Secretary of the United States Department of Health and Human Services ("HHS") have entered into a stipulation, which the court has approved, to permit the intervention of Betson, Woodard and Williams and allow the amended complaint be filed of record. Both the state and federal defendants oppose the intervention of Juana del Pueblo and the certification of a class. Because of the disposition of the other intervening plaintiffs' motion, the court will deny intervention by Juana del Pueblo.

Plaintiff Betson began receiving AFDC benefits in 1977. She has two children, ages four and six. She receives monthly child support of $60.00[10] for her oldest child. Until her AFDC grant of $335.00 per month ceased, she paid $63.00 per month for rent in public housing, which was reduced to $6.00 per month once her grant ceased. Her utility bills occasionally reach $125.00 per month. She has a student loan, which is spent toward her schooling.

In April 1982 plaintiff Betson was involved in an automobile accident resulting in injuries to her leg and jaw. In December 1982, in settlement of

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[10]Although her complaint asserts that she receives $80.00 per month in child support, she testified before the court that she receives $60.00 per month. The court will accept the latter figure.

her claim for pain and suffering, she received $18,175.00.[11] No longer than two weeks after receipt of that money, DPW mailed a notice to her advising her that, in accordance with the lump sum rule, her and her children's AFDC grant would be terminated until July 1985. By June 1983 plaintiff Betson had exhausted the $18,175.00. She reapplied for AFDC and was told she would not be eligible for assistance until twenty-nine months had expired, in accordance with the lump sum rule. Her appeal resulted in a finding that she had exhausted her lump sum amount but that she remained ineligible for an AFDC grant due to the lump sum rule. She receives food stamps and medical assistance and, by agreement

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[11]The settlement totalled $26,000.00 of which her attorney retained $7825.00. The figures are somewhat at odds with her testimony but the difference is insignificant for these purposes.

of the parties pending the outcome of this case, has been receiving an AFDC grant. Otherwise, she has no source of income.

Plaintiff Woodard has been receiving an AFDC grant for herself and her son since 1974. In March 1983, as a result of injuries she sustained in an automobile accident, Woodard received $6600.00 of a $10,000.00 settlement for pain and suffering. She reported the settlement to DPW and was advised that she owed the department $1700.00 for assistance received while her accident claim was pending and would then be ineligible for an AFDC grant for fifteen months[12] based on the lump sum rule.

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[12]In her complaint Woodard asserts that DPW advised her that she would be ineligible for 15 months. She testified that it was for 11 months. The court, viewing the situation on a "worst case" basis, will assume her ineligibility is for 15 months.

Plaintiff Woodard has been receiving food stamps and medical assistance since July 1983. She has been receiving AFDC assistance pending a request for reconsideration of Cohen's decision. If her benefits are terminated she will have no other source of income.

Plaintiff Williams has three children. She was a recipient of AFDC benefits until October 1983 and has had no earned income since the summer of 1982. At the time her grant ceased she was receiving $401.00 per month in AFDC assistance. In early August 1983 she received retirement benefits, for which she was required to apply as a condition of receiving AFDC benefits and for which she signed a confession of judgment in favor of DPW, totalling $4780.98. The $4780.98 was exhausted by the end of August. Her AFDC grant was terminated in September 1983 and by notice dated

October 26, 1983 DPW advised her that she was ineligible for assistance for a period of time based on the lump sum rule. Her income consists of $39.03 per month in retirement benefits and $107.00 per month in child support which is restricted to the use of her six-year old child.

As stated earlier, the plaintiffs challenge the validity of federal and state regulations implementing 42 U.S.C. §602(a)(17) which was enacted as Section 2304 of the Omnibus Budget Reconciliation Act of 1981, P.L. 97-35, 95 Stat. 357, 845 (1981) ("OBRA"). This new section changed the treatment of lump sum payments received by AFDC applicants or recipients. Prior to the enactment, if an assistance unit received a non-recurring lump sum of money, it was counted as income in the month of

receipt. If the funds were expended and other eligibility conditions were met, the assistance unit would be eligible for AFDC in the next month.

The new section provides:

> §602. State plans for aid and services to needy families with children; contents; approval by Secretary (a) A State plan for aid and services to needy families with children must
>
> (17) provide that if a person specified in paragraph (8)(A)(i) or (ii) receives in any month an amount of income which, together with all other income for that month not excluded under paragraph (8), exceeds the State's standard of need applicable to the family of which he is a member --
>
> (A) such amount of income shall be considered income to such individual in the month received, and the family of which such person is a member shall be ineligible for aid under the plan for the whole number of months that equals (i) the sum of such amount and all other income received in such month, not excluded under paragraph (8), divided by (ii) the standard of need applicable to such family, and
>
> (b) any income remaining (which amount is less than the applicable monthly standard) shall be treated as income received in the first month following the period of ineligibility

specified in subparagraph (A);....

42 U.S.C. §602(a)(17).

The section incorporated in section 602(a)(17) states:

> (a) A State plan for aid and services to needy families with children must
> (8)(A) provide that, with respect to any month, in making the determination under paragraph (7), the State agency--
>
> (i) shall disregard all of the earned income of each dependent child receiving aid to families with dependent children who is (as determined by the State in accordance with standards prescribed by the Secretary) a full-time student or a part-time student who is not a full-time employee attending a school, college, or university, or a course of vocational or technical training designed to fit him for gainful employment;
>
> (ii) shall disregard from the earned income of any child or relative applying for or receiving aid to families with dependent children, or of any other individual (living in the same home as such relative and child) whose needs are taken into account in making such determination, the first $75 of the total of such earned income for such month (or such lesser amount as the Secretary may prescribe in the case of an individual not engaged in full-time employment or not employed throughout the month);....

42 U.S.C. §602(a)(A)(i) and (ii). It is the incorporation and interpretation of this section that is initially at issue.

The federal and state regulations apply §602(a)(17) when any recipient of AFDC receives a lump sum. The state regulations have been applied to personal injury awards. It is the plaintiffs' argument that the Social Security Act limits the application of the lump sum disqualification rule to AFDC recipients who have earned income. They also argue that compensation for pain and suffering is not "income" and therefore not subject to the rule. Finally, it is plaintiffs' argument that DPW's practice is violative of its regulations which they argue limits income subject to the lump sum disqualification to "windfalls" or "accumulated or retroactive benefits."

The federal regulation setting out the lump sum rule provides:

> When the AFDC assistance unit's income, after applying applicable disregards, exceeds the State need standard for the family because of receipt of nonrecurring lump sum income, the family will be ineligible for aid for the full number of months derived by dividing the sum of the lump sum income and other income by the monthly need standard for a family of that size. Any income remaining from this calculation is income in the first month following the period of ineligibility.

45 C.F.R. §233.20(a)(3)(ii)(D) (1982). It is plaintiffs' argument that this regulation is inconsistent with the authorizing statute because the Congress intended for the lump sum rule to apply only to recipients with earned income.

The Social Security Act section is ambiguous. Both the plaintiffs' reading that, by referring to sections 602(a)(8)(i) and (ii), Congress intended to mean only those persons having earned income, and defendants' interpretation

that, by that reference, Congress intended to refer only to the type of person applying for or receiving AFDC, i.e. all AFDC recipients, is supportable. In the face of an ambiguous statute, the court must turn to the legislative history. Tidewater Oil Co. v. United States, 409 U.S. 151, 157 (1972).

The AFDC program is a joint federal-state program which has as its purpose the enabling of states to furnish financial assistance to families with dependent children. Its stated purpose is "to help...parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection...." 42 U.S.C. §601. States participating in the program must submit to HHS, the

administering federal agency, a plan consistent with federal law.

When then Secretary of HHS, Richard S. Schweiker, proposed the amendment to the Social Security Act, he stated that the purpose was "to ensure that people assume more personal responsibility for planning the use of income to meet their needs." (Hearings before the Committee on Finance, U.S. Senate, 97th Cong., 1st Sess., March 17, 1981, p. 33.) The Secretary explained that the rule would come into effect "[w]hen a large amount of money is received as a lump sum (for example, an inheritance)...." Id. The testimony of former Secretary Schweiker fails to mention any intention of limiting application of the rule solely to applicants with earned income. The Budget Committee Report describes the purpose of the measure to be to

eliminate the incentive to spend lump sums quickly in order to retain AFDC eligibility. [1981] U.S. Code Cong. (Admin. News at 771.) In neither the Senate Budget Committee Report nor the House Conference Report is the receipt of earned income discussed as a prerequisite to the application of the new lump sum rule. Id. at 702, 1341.

Significantly, then, there is no support in the legislative history for the plaintiffs' reading of the statute.

In its interim rules published in the Federal Register, HHS explained section 402(a)(17) as follows:

> Prior to enactment of the new provision, any payments to an assistance unit that met the definition of income (e.g., retroactive Social Security benefits) were counted as income in the month of receipt, and considered a resource to the extent retained, in the following months.
>
> The new section 402(a)(17) of the Act requires all income to be considered available to meet the present and

future needs of AFDC recipients. It is the responsibility of the caretaker relative to budget accordingly. To do this, States must first determine whether the family's total amount of earned and unearned income...exceeds the State's need standard in the month of receipt of the income.

. . .

For purposes of this provision, the new regulations do not alter the definition of income now employed by States.

. . .

46 Fed. Reg. 46755 (1981) (emphasis supplied).

The rules were promulgated by the agency charged with administering the program contemporaneously with enactment of the amendment. They were not to be made final for sixty days in order to give all interested parties time to comment. Id. at 46750.

In response to comments regarding the proposed rule, HHS made some revisions and clarifications. It agreed that the provision should be "construed to encourage recipients to budget nonrecurring lump sum income."

47 Fed. Reg. 5656 (1982) (emphasis supplied). The agency also reiterated the fact that the "Omnibus Budget Reconsiliation Act of 1981 did not change how States treat income." Id. at 5656. States would continue to be permitted to "exclude income which the recipient receives as settlement for back medical bills, compensation for loss of resources, etc., so long as the money is used for that purpose." Id. The final rule at issue was codified in 45 C.F.R. Part 233.

These regulations must be read in light of the following rule of law:

> When presented with a problem of statutory construction, we must give deference to the interpretation given the statute by the officers or agency charged with its administration, unless the interpretative regulation can be said not to be a reasoned and supportable interpretation of the statute.

Levine v. Farleigh Dickinson Univ., 646 F.2d 825, 831 (3d Cir. 1981) (citing Whirlpool Corp. v. Marshall, 445 U.S. 1, 11 (1980)). See also Udall v. Tallman, 380 U.S. 1, 16 (1964). In light of the language and legislative history of the lump sum rule, this court cannot say that the Secretary's regulation applying the lump sum rule to earned and unearned income is unreasonable.

The legislative history clearly reveals an effort to give AFDC assistance units an incentive to budget the lump sum payment. This incentive exists whether or not there is earned income. The equation used to determine the period of eligibility accounts for earned and unearned income. The burden on recipients with no earned income, were they to budget according to the method of calculating ineligibility, is no different than the burden on

recipients with earned income.

That finding, however, does not end the matter. As stated earlier, plaintiffs also contend that the treatment of personal injury awards for pain and suffering as income violated federal law and Pennsylvania's own regulations. The term "income" is not defined in the AFDC statute or regulations. The statute generally provides that "in determining need, [the State shall] take into consideration any...income and resources" of an AFDC applicant except as otherwise disregarded. 42 U.S.C. §602(a)(7). The regulations promulgated under the statute expressly provide for the exclusion or the disregard of certain items. See 45 C.F.R. §233.20(a)(3). Personal injury awards are not among the excluded items. Furthermore, as noted, the agency responded to comments

regarding the treatment of income when it is received as a settlement for specific bills by reiterating that such payments are not included as income. There is no indication of like treatment for personal injury damage awards.

The plaintiffs argue that their position is supported by the exclusion of personal injury awards as income under the Internal Revenue Code. That exclusion, however, is expressly established by statute at 26 U.S.C. §104(a)(2). Were such a provision not made, such awards could be considered income under the Internal Revenue Code general provision of income, 26 U.S.C. §61(a). See Roemer v. Commissioner of Internal Revenue, 716 F.2d 693, 696, n. 2 (9th Cir. 1983) ("Since there is no tax basis in a person's health and other personal interests, money received as compensation for an injury to those

interests might be considered a realized accession to wealth" absent the exclusion.) The plaintiffs' argument fails in light of these considerations.

Finally, plaintiffs contend that DPW misapplies the State regulations which define "lump summ income" as:

> Income -- Cash or income-in-kind received by the client, including but not limited to, contributions by a legally responsible relative (LRR), and the following:
>
> . . .
>
> (iv) Lump sum payments as provided in §183.44(b) (relating to procedures).
>
> (A) A lump sum payment is a nonrecurring cash payment. Regulations regarding lump sum payments do not apply to any items, as provided in Chapter 257 (relating to reimbursement), for which adknowledgment of liability is signed, unless the amount to be reimbursed is less than the lump sum payment. In such cases, the excess remaining would be treated in accord with §183.44(b)(1) (relating to procedures).

55 Pa. Code §183.22.

The section specifically covering lump sum payments describes them as:

> i) The types of lump sum income. The types of lump sum income are as follows:
>
> (A) Windfalls. Windfalls may include, but are not limited to, prizes, insurance benefits, gifts, inheritances and the like.
>
> (B) Accumulated or retroactive benefits. These benefits include, but are not limited to, retroactive RSDI, Worker's Compensation, or Unemployment Compensation, and the like. Such benefits are usually subject to reimbursement requirements in accordance with Chapter 257 (relating to reimbursement).

55 Pa. Code §183.44(b)(1)(i).

The question as to whether personal injury awards for pain and suffering fall within these State regulations is not free from doubt. The court is guided by Supreme Court precedent regarding the scope of review afforded agency interpretation of its own regulations:

> Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt.... [T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation. Bowles v. Seminole Rock Co., 325 U.S. 410, 413-414 (1945).

The regulations clearly do not limit what items are to be included in the categories of lump sum income. A settlement for personal injury falls within the language "nonrecurring cash payment." Although the court might not describe such a payment as a "windfall" in the sense that a windfall tends to connote an unexpected gain, it cannot be said to be "inconsistent" to do so in light of the cross-reference to section 257 which includes "personal damage claims and awards" in its list for reimbursement to the agency. By deferring to the agency interpreting its

own regulations, the court is constrained to find that the practice of DPW in treating personal injury awards as lump sum payments is neither "plainly erroneous [n]or inconsistent with the regulation."

Because the court has found for both the federal and state defendants and, therefore, injunctive relief is unavailable to these plaintiffs, a decision on the class certification motion, which motion is strongly opposed by the defendants, is obviated. The court notes, however, that it views this case as inappropriate for class action in that the plaintiffs have failed to demonstrate that the class is so numerous that joinder of all members is impracticable, as required by Rule 23(a)(1) of the Federal Rules of Civil Procedure.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NANCY BETSON, ANNABELLE WOODARD and CYNTHIA WILLIAMS on behalf of themselves and all other similarly situated	:	
	:	C.A. NO. 83-3543
VS.	:	
WALTER COHEN, Secretary of the Pennsylvania Department of Public Welfare; and DON JOSE STOVALL, Executive Director of the Philadelphia County Board of Assistance; and MARGARET M. HECKLER,; Secretary of the United States Department of Health and Human Services	:	

ORDER

The motion of Nancy Betson, Annabelle Woodard, and Cynthia Williams for injunctive relief is DENIED.

The motion of Juana del Pueblo to intervene is DENIED.

The motion of the plaintiffs for class certification is DENIED.

Judgment is entered in favor of defendants Walter Cohen, Don Jose Stovall, and Margaret M. Heckler and against plaintiffs Betson, Woodard and Williams.

IT IS SO ORDERED.

s/
CHARLES R. WEINER